OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 18 July 2007 [1]

I — Introduction

1. The main proceedings before the French Cour de Cassation (Court of Cassation) concern a dispute between the Société Pipeline Méditerrannée et Rhône (SPMR) and the French customs administration [2] regarding an exemption from excise duty of fuel which leaked from an oil pipeline owing to technical failures.

2. The exemption under Article 14(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [3] is subject to the condition that the loss which occurred under suspension arrangements is attributable to fortuitous events or *force majeure* or is to be regarded as a loss 'inherent in the nature of the products'. The Cour de Cassation seeks an interpretation of those terms by the Court of Justice.

II — Legal Framework

A — *Directive 92/12*

3. According to Article 3, Directive 92/12 applies inter alia to mineral oils, as defined by the relevant directives.

4. Article 5(1) lays down when a product becomes subject to excise duty:

'The products referred to in Article 3(1) shall be subject to excise duty at the time of their production within the territory of the Community as defined in Article 2 or of their importation into that territory.

1 — Original language: German.

2 — More precisely: Administration des Douanes et Droits Indirects (Customs and Indirect Taxes Administration), together with the Direction Nationale du Renseignement et des Enquêtes Douanières (National Excise Information and Investigations Department; 'DNRED').

3 — Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992, L 76, p. 1). In the meantime that Directive was amended a large number of times, but the provisions which are the subject of dispute in the main proceedings remained unaffected by the amendments.

"Importation of a product subject to excise duty" shall mean the entry of that product into the territory of the Community ...'

5. Article 6(1) on the other hand lays down the point at which the excise duty actually become chargeable, that is when the tax debt arises:

'Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

Release for consumption of products subject to excise duty shall mean:

(a) any departure, including irregular departure, from a suspension arrangement;

(b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;

(c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.'

6. Article 14 of the Directive lays down the conditions under which losses are exempt from tax:

'(1) Authorised warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or *force majeure* and established by the authorised of the Member State concerned. They shall also be exempt, under suspension arrangements, in respect of losses inherent in the nature of the products during production and processing, storage and transport. Each Member State shall lay down the conditions under which these exemptions are granted. These exemptions shall apply equally to the traders referred to in Article 16 during the transport of products under excise duty suspension arrangements.

(2) Losses referred to in paragraph 1 occurring during the intra-Community transport of products under excise duty suspension arrangements must be established according to the rules of the Member State of destination.

(3) Without prejudice to Article 20, the duty on shortages other than the losses referred to

in paragraph 1 and losses for which the exemptions referred to in paragraph 1 are not granted shall be levied on the basis of the rates applicable in the Member States concerned at the time the losses, duly established by the competent authorities, occurred, or if necessary at the time the shortage was recorded.'

B — *National law*

7. Article 158 C of the French Code des Douanes (Customs Code) which, according to the referring court, transposes Directive 92/12, reads as follows:

'Losses of products placed under tax warehousing arrangements for the storage of petroleum products are not subject to duty if it is proven to the authority:

1. that they are caused by fortuitous events or *force majeure*;

2. or that they are inherent in the nature of the products. The Minister for Budgets may for this purpose lay down by order a maximum lump sum of tax-free losses in respect of each type of product and each mode of transport.'

III — Facts and questions referred for a preliminary ruling

8. Fuel leaked from an oil pipeline onto the territory of the commune of Saint-Just-Chaleyssin (Département Isère) over a period of several days. SPMR transported fuel in this pipeline under excise duty suspension arrangements to Switzerland. The pipeline subsequently burst on 1 January 1997. Fuel thereby escaped from the pipeline, only part being recoverable from the soil.

9. SPMR then claimed an exemption from excise duties in respect of 795 201 litres of fuel allegedly lost. Following rejection of that claim, the Customs Administration brought an action for payment of the tax, which was at first unsuccessful. The Cour d'Appel (Court of Appeal) then partly allowed the action and held that there had been no fortuitous events or *force majeure* within the meaning of Article 158 C of the Code des Douanes. In French law, *force majeure* applied only to events which were unforeseeable and unavoidable and which were caused by factors extraneous to the person concerned.

10. SPMR contests that finding in its action before the Cour de Cassation. In the alternative SPMR submits that the loss is in any case inherent in the nature of the products.

The Cour de Cassation decided by order of 11 July 2006 to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Must the concept of *force majeure* giving rise to losses to products under duty suspension arrangements, within the meaning of Article 14(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, be interpreted as meaning unforeseeable and unavoidable circumstances extraneous to the authorised warehousekeeper who seeks to rely on those circumstances in support of its application for exemption from duty, or is it sufficient that the authorised warehousekeeper could not have avoided those circumstances?

(2) Can losses of part of the products which have escaped from a pipeline due to their liquid nature and to the characteristics of the ground on which they spilled, which hindered their recovery and led to the levying of duty on them, be regarded as inherent in the nature of the products within the meaning of Article 14(1) of Directive 92/12?'

11. SPMR, the French, Italian and Polish Governments and the Commission of the European Communities have submitted observations.

IV — Analysis

A — *Preliminary remarks*

12. Article 6(1) of Directive 92/12 lays down that excise duty on taxable products such as mineral oil is to become chargeable not only by virtue of release for consumption, but also when shortages are recorded pursuant to Article 14(3) of Directive 92/12. Shortages are however exempt from tax under Article 14(1), if the loss occurred under suspension arrangements which are attributable

— to fortuitous events (*cas fortuit*)

— to *force majeure* or

— to loss inherent in the nature of the products.

13. In its first question, the referring court seeks clarification whether the leaked fuel

constitutes a loss attributable to *force majeure* and, in the second question, whether it can be seen as a loss in the sense of the third group of tax-exempt losses.

14. Two preliminary remarks are called for in that regard. The first is that the concepts referred to in Article 14(1) are to be seen as autonomous concepts of Community law.

15. Admittedly, the third sentence of Article 14(1) of Directive 92/12 provides that each Member State is to lay down the conditions under which those tax exemptions are granted. However, as the Commission correctly points out, the third sentence of Article 14(1) of Directive 92/12 cannot be understood to mean that the Member States may define the decisive concepts of '*force majeure*' and 'loss' independently according to the tenets of their national legal systems.

16. According to the fourth recital in the preamble to Directive 92/12, in order to ensure the establishment and functioning of the internal market, chargeability of excise duties is to be identical in all the Member States. That goal of the Directive would be in danger, were the substantive conditions for tax exemption to depend on the factual conditions defined in national law. The competence of the Member States to lay down the conditions for the grant of tax exemption extends rather only to the more detailed circumstances surrounding the grant of the exemptions — such as the details of the administrative procedures — which are not set out in the Directive, and not the content of such exemptions. [4]

17. Moreover, in other legal fields the Court of Justice has to date consistently interpreted the concept of '*force majeure*' as a Community law concept, without reference to national concepts. [5]

18. The second preliminary remark to be made is that, according to the facts as set out by the referring court, there is no doubt that a 'loss' of fuel within the meaning of Directive 92/12 has taken place. That obtains, as the Commission rightly points out, even if the concept is interpreted in accordance with the similar concept referred

4 — See in that regard Case C-494/04 *Heintz van Landewijck* [2006] ECR I-5381, paragraph 41, and, on the similar Article 13A(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, Case C-498/03 *Kingscrest and Montecello* [2005] ECR I-4427, paragraph 24 with further references, and my Opinion in Joined Cases C-443/04 and 444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, point 21).

5 — See for example the judgments cited in footnotes 18 and 19.

to in Article 4 of Directive 79/623/EEC. [6] The Court has decided with regard to that provision that there is no loss where there is a risk that the missing product would be put into circulation within the Community, which is in particular possible in the case of theft. [7] In the present case, however, the fuel has seeped irretrievably into the ground, with the result that the mixture must be disposed of as waste. It is therefore impossible for it to be put into circulation within the Community.

B — *On the first question referred for a preliminary ruling*

19. By its first question the referring court offers the Court of Justice the choice of two alternatives for the more detailed definition of the concept of *force majeure*. It asks whether the event which gave rise to the loss must have been unforeseeable and unavoidable and caused by a factor extraneous to the warehousekeeper or whether what is decisive is the inability to avoid the loss.

20. Underlying the formulation of the question is obviously the concept of *force majeure* which exists in French law. Given that the question concerns the interpretation of an autonomous concept of Community law, it is however not appropriate, as the Commission correctly points out, to use terminology shaped by a national understanding, as in the order for reference. An independent definition of the concept of *'force majeure'* must therefore be developed in what follows.

21. Although the referring court does not expressly enquire as to the meaning of the concept of 'fortuitous events' (*cas fortuit*) it is first necessary to clarify the relationship between that concept and loss caused by *force majeure*.

1. Relationship between the concepts of 'fortuitous events' (*cas fortuit*) and *force majeure*

22. According to the German version of Directive 92/12, in addition to *force majeure*, loss attributable to *'Untergang'* also leads to a tax exemption. The sense of *Untergang* is any irretrievable loss of a thing, irrespective of the particular circumstances or of the responsibility of the warehousekeeper for that loss. Given that the leaked fuel seeped into the soil and could not be retrieved for use, on an analysis of solely the German language version, *Untergang* would have

6 — Council Directive of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt (OJ 1979 L 179, p. 31).

7 — Joined Cases 186/82 and 187/82 *Esercizio Magazzini Generali* [1983] ECR 2951, paragraph 14.

occurred in this case. The quantity which leaked would therefore have to be tax-exempt irrespective of the existence of *force majeure*.

23. The German version of the Directive, however, diverges from the other language versions. They appear to juxtapose with the concept of *force majeure* not the concept of *Untergang* but rather a concept corresponding to the French *cas fortuit*, which is probably best translated in German as '*Zufall*'. [8] If the various language versions of a legal measure differ from each other, or at least leave room for divergent interpretations, the provision in question must — in accordance with settled case-law — be interpreted by reference to the context and purpose of the rules of which it forms part. [9]

24. Taking into account the scheme of the Directive, the German concept of *Untergang* should be understood to signify the occurrence of fortuitous events as in the other language versions. [10] Were the concept of *Untergang* to be understood as any final loss — whether or not caused by fault — the juxtaposed notion of loss attributable to *force majeure* would be deprived of any autonomous meaning. That is because loss attributable to *force majeure* in most cases also results in the perishing of the product. [11]

25. Furthermore, those twin concepts can be found in other legal provisions, including Article 45(2) of the Statute of the Court of Justice. [12] There they are translated into German as '*höhere Gewalt oder Zufall*' (In English: 'unforeseeble circumstances or ... *force majeure*'). It must therefore be assumed that exemption only applies in cases of loss attributable to fortuitous events or *force majeure* and should not already be granted where the products simply perish.

8 — Compare for example the following language versions, in which the Directive was originally adopted: EN: fortuitous events; ES: caso fortuito; IT: casi fortuiti; DK: haendelige begivenheder; NL: toevallige omstandigheden; PT: casos fortuitos; GR: τυχαία περιστατικά.

9 — Cases C-372/88 *Cricket St. Thomas* [1990] ECR I-1345, paragraph 19; Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 20); and Case C-300/05 *ZVK* [2006] ECR I-11169, paragraph 16.

10 — In Austria and Germany the Directive was in that respect adopted literally, which in view of the meaning of the legal concept of *Untergang* in those legal systems is likely to lead substantive divergences from the Directive (see for example paragraph 38 of the Austrian *Mineralölsteuergesetz* 1995 — Law on Mineral Oils, BGBl. Nr. 630/1994, and paragraph 14(1) of the German *Energiesteuergesetz* — Law on energy taxes, BGBl. 2006 I, 1534).

11 — Only in the cases of loss attributable to theft (assuming that is to be seen as a case of *force majeure*) has a thing not at the same time 'perished'.

12 — See for example Article 45(2) of the Statute of the Court of Justice.

26. The referring court asks directly only for the interpretation of the concept of *'force majeure'* without referring to the concept of fortuitous events (*cas fortuit*). The probable explanation for this is that, unlike for example in German law, [13] in French law the predominant view is that those concepts overlap and cannot be clearly distinguished from each other. [14]

27. As far as Community law is concerned, the Court has also not distinguished between the two concepts, [15] frequently examining them according to identical criteria without further explanation. [16] In the main the Court has, however, placed the concept of *force majeure* at the centre of its reasoning and has not accorded the concept of fortuitous events an autonomous meaning. [17] In this case the focus of the analysis will therefore also be on the interpretation of the concept of *force majeure*.

2. Interpretation of the concept of *force majeure*

28. The Court has not yet given a more detailed interpretation of the concept of *force majeure* under Article 14(1) of Directive 92/12. It has, however, frequently had the opportunity to explain its meaning in the context of other provisions. As a first step I will explain that case-law relating to the other legal fields and then examine whether it is capable of application with or without modification to Directive 92/12.

(a) Case-law of the Court in other fields

29. The majority of the case-law on *force majeure* concerns provisions on the common organisation of the market in the agricultural sector. The Court has also, however, already had to interpret the concept in its case-law concerning Article 45 of its Statute.

13 — German law frequently distinguishes between fortuitous events of an 'ordinary' character (*'einfacher Zufall'*) and *force majeure* as an example of fortuitous events of an 'aggravated' nature (*'gesteigerter Zufall'*).

14 — See, in that regard, Terré/Simler/Lequette, Droit civil — Les obligations, Éditions Dalloz, ninth edition 2005, paragraph 581 with further references.

15 — In its judgment in Case C-195/91 P *Bayer* [1994] ECR I-5619, paragraph 33, the Court explicitly left open the question whether there is a difference between those concepts.

16 — See, for example, Case C-25/65 *SIMET* [1967] ECR 33, 42-43; Order of 5 March 1993 in Case C-102/92 *Ferriere Acciaierie Sarde* [1993] ECR I-801, paragraph 20; *Bayer*, cited in footnote 15, paragraph 32.

17 — Only in its very early judgment in *SIMET* (cited in footnote 16, pp. 42-43), which in that regard has remained an isolated case, did the Court of Justice with reference to Article 45 of its Statute assume that unforeseeable circumstances had occurred, without distinguishing that concept from that of *force majeure*, when an application did not reach the Court until four days after its arrival in Luxembourg.

30. According to that case-law, in principle the Community law concepts of *force majeure* or fortuitous events cover only those events which are abnormal and unforeseeable, over which the party relying upon them had no control, and the consequences of which could not have been avoided even if all due care had been exercised. [18] It follows that both *force majeure* and fortuitous events are concepts which contain an objective element and a subjective element, the former referring to abnormal circumstances outside the sphere of the trader in question and the latter connected with his obligation to guard against the consequences of abnormal events by taking appropriate steps without making unreasonable sacrifices. [19]

31. Admittedly the Court has emphasised repeatedly that the concept of *force majeure* does not have the same scope in the various areas of application of Community law and that its meaning must be determined by reference to the legal context in which it is to operate. [20] The above definition is however to apply 'apart from special cases in specific areas in which it is used'. [21] It is therefore clear that the definition does not have to be reworked in every new legal context but operates as a general definition, only requiring adaptation in certain cases.

(b) Application to the case

32. The question to be examined here is whether, in a situation such as that in the main proceedings, there is a case of *force majeure* already according to the customary definition.

33. That requires from a subjective point of view that the consequences could not have been avoided even if all due care had been exercised. All the parties to the main proceedings are agreed that the lack of fault or of negligence is an essential condition for the existence of *force majeure*, that is to say that *force majeure* is in any case not present when the party relying upon it has not shown all due care in the circumstances of the case.

18 — See the Court's settled case-law, for example, Case C-145/85 *Denkavit* [1987] ECR 565, paragraph 11; Case C-12/92 *Huygen* [1993] ECR I-6381, paragraph 31; Case C-105/02 *Commission* v *Germany* [2006] ECR I-9659, paragraph 89; and Case C-377/03 *Commission* v *Belgium* [2006] ECR I-9733, paragraph 95.

19 — *Bayer*, cited in footnote 15, paragraph 32; Order of 18 January 2005 in Case C-325/03 P *Zuazaga Meabe* [2005] ECR I-403, paragraph 25.

20 — *Huygen*, cited in footnote 18, paragraph 30; Case C-263/97 *First City Trading and Others* [1998] ECR I-5537, paragraph 41.

21 — *Ferriere Acciaierie Sarde*, cited in footnote 16, paragraph 20.

34. In that regard the Italian Government submits that, given that negligent conduct on the part of SPMR in the maintenance of the pipeline is not ruled out, *force majeure* can already be excluded for that reason. The assessment whether SPMR was negligent is, however, as rightly emphasised by the Commission, the French and the Polish Governments, a matter for the referring court.

35. The absence of fault will not of itself suffice for the purposes of the above definition. The causative event must in addition be abnormal and unforeseeable and the party who relies on *force majeure* must not have exercised any control over it. The Court's so-called 'objective' criterion must therefore also be fulfilled: the circumstances must be abnormal and extraneous to the trader in question.

36. The reasons for leakage of the fuel in this case were a crack in the pipeline and in particular the subsequent burst of the pipeline. In other words the leak was caused by a technical failure of the pipeline. Occurrences which are closely connected to the effective functioning of the technical means used by the operator of a pipeline are, however, in principle within his sphere of control, given that he exercises direct control over their selection and maintenance and that what is involved is the occurrence of an occupational risk (albeit perhaps a slight one).

37. There must also be doubts concerning the abnormal character and unforeseeability of such a technical failure, as in the past the Court has set rather demanding standards for those criteria to be met. For example, the Court did not regard an event as abnormal and unforeseeable just because it is a rare phenomenon. [22] Accordingly, a relatively rare technical failure of an operating asset should also not be considered as abnormal or unforeseeable because the risk of a technical failure is inherent in all technology. On the other hand, the assessment whether the crack which occurred was an event so rare that no operator could reasonably have reckoned with its occurrence is a question of fact, to be answered by the referring court.

38. Without prejudice to the further determination of the facts in the main proceedings, application of the customary definition to a situation such as that in issue here does not therefore result in a finding of *force majeure*.

22 — In its judgment in Case C-124/92 *An Bord Bainne and Inter-Agra* [1993] ECR I-5061, paragraph 15, the Court for example did not regard it as abnormal and unforeseeable, when legal provisions of an exporting country which had been in force without modification for 30 years were amended without prior announcement or notice.

3. Adaptation of the definition for the purposes of Directive 92/12?

39. In the opinion of the Commission and of SPMR, the above definition must be adapted to the particular legal scheme and to the purposes of the Directive. In their view, a warehousekeeper's sphere of responsibility does not extend to an event which, despite the exercise of all due care, he could not avoid. To require in addition that the event which causes the damage must have come from an external source and been unforeseeable would place the burden of risk one-sidedly on the warehousekeeper. That would also be unjustified because warehousekeepers are authorised in accordance with Article 12 of Directive 92/12.

40. SPMR emphasises that in this case there is, first of all, no dispute that the product concerned perished and that there was therefore no possibility for it to enter circulation within the Community. Second, it, as a warehousekeeper, was not at fault for the loss. In such a situation, in view of the purpose of the Directive, there was however no obvious reason to levy excise duty.

41. That position is however contradicted by the clear wording of Article 14 of Directive 92/12. Under that provision, the recording of shortages is considered to be a distinct factual basis for the levy of taxation and does not merely establish a rebuttable presumption that the missing products have entered circulation within the Community.

42. Even taking into account the Commission's argument concerning a fair distribution of risk, a particularly broad interpret
ation of the concept of *force majeure* does not seem mandatory.

43. In that regard, it must first be noted that the Directive establishes taxation of shortages as the rule and the exemption merely constitutes an exception to that rule. Exemptions are however to be interpreted strictly. Moreover, the term *force majeure* itself as used in everyday parlance suggests that it applies only to a few cases.

44. The opinion of SPMR and of the Commission would lead ultimately to *force majeure* being equated with the considerably

wider concept of lack of fault. Tax law does not however employ the concept of fault as a standard. The distribution of risk, with regard to the taxation of consumer products, relies rather on a division into spheres of control and not on compliance with certain duties of care. In this case the overriding consideration is who has to bear the fiscal consequences when the typical occupational risk occurs. In that respect, a technical failure of the mode of transport employed by the warehousekeeper falls into his sphere of risk.

45. It is true, as the Commission and SPMR argue, that the warehousekeeper is thereby exposed to a very substantial risk that he will have to pay the tax for products which have gone missing. That distribution of the risk is, however, justified by the fact that the warehousekeeper transports and exercises control over products which have been liable to tax from the time of their production within Community territory or their importation into that territory. [23] In order to facilitate the smooth transit of the products to third countries, taxation is suspended during transport through the Community. As the warehousekeeper therefore benefits from a special regime, it also seems not unreasonable to impose on him during the operation of that regime the risks which arise from his sphere of control.

46. The fact that a warehousekeeper is obliged under Article 12 of Directive 92/12 to be authorised as such, and is subject to certain duties under Article 13, cannot result in his being partly relieved of the fiscal risks associated with the transport by pipeline of goods subject to excise duty and in those risks being transferred to the State. The purpose of the authorisation is only to ensure that the warehousekeeper is sufficiently reliable for the purposes of the tax suspension procedure.

47. The relief provided under tax suspension arrangements by the second sentence of Article 15(3) from the obligation to provide a guarantee in the case of transport by pipeline also merely takes account of the fact that there is only a small risk of manipulation or loss where that form of transport is concerned. However, if, contrary to expectations, shortages do occur, the division of risks as described above is maintained. The authorisation given for the building and operation of the pipeline by the State equally fails to establish its joint liability for the excise duty applicable to shortages which occur because of leakage from the pipeline due to a technical failure.

48. Finally the argument should be rejected that the products were not brought into use but went missing beforehand. The factual basis for taxation does not require that products subject to excise duty were in fact used for the purpose envisaged. If that were

23 — See Article 5(1) of Directive 92/12.

so, the purchaser of a product who has already paid the tax would have to receive a refund of that tax if the taxed product perishes before being used for its intended purpose. The Directive does not provide for that. So there is no right to claim a tax refund when, after purchasing a bottle of wine, the bottle slips out of the purchaser's bag and the wine pours out onto the street, a use which was certainly not the intended one.

4. Interim conclusion

49. In summary, it must be concluded that the definition of *force majeure* developed in a consistent line of case-law also appears appropriate for the purposes of the current proceedings.

50. The answer to the first question must therefore be that *force majeure* as the cause of losses occurring under suspension arrangements requires that the loss has occurred because of events which are abnormal and unforeseeable, over which the party who relies on *force majeure* had no control and the consequences of which could not have been avoided even if all due care had been exercised.

C — *The second question*

51. The second question asks in effect whether the seepage of the fuel into the ground can be seen as a loss inherent in the nature of the product, namely in its nature as a liquid.

52. All the parties concerned, with the exception of SPMR, are agreed that that does not amount to a tax-exempt loss for the purposes of Article 14(1) of Directive 92/12. The concept of 'losses inherent in the nature of the products' covers, as the wording already makes clear, only those losses which occur as a result of *natural* causes without intervention of other special circumstances. [24] An example would be evaporation as a result of the volatility of certain substances.

24 — The French '*perte naturelle*' makes this particularly clear.

53. In this case the loss occurred as a result of the cracking and the subsequent bursting of the pipeline, that is to say as a result of an accident. Thus the loss concerned is primarily one caused by an accident and is not a loss occurring naturally in the course of the *customary* method of transport, attributable *solely* to the inherent nature of the product.

54. The fact that only the liquid nature of the oil made possible the subsequent seepage into the ground cannot alter that conclusion. Otherwise every leakage of mineral oil and its subsequent seepage into the ground would in the end, independently of the earlier cause of the leak, be attributable to the inherent nature of the products and therefore exempt from tax — even where the transporter acted intentionally or in a reproachable manner. [25] That would be contrary to the responsibility of the warehousekeeper for his sphere of control explained above.

55. That interpretation is confirmed, as the French Government submits, by the fact that several Member States have enacted legal provisions, based on experience, in order to lay down limits for the exemption of tax in respect of losses from natural causes.

56. The reference made by SPMR to the Advocate General's Opinion in Joined Cases 186/82 and 187/82 *Esercizio Magazzini Generali* [26] also misses the point. Irrespective of whether the examples provided in that Opinion [27] with a view to explaining Article 11 of Directive 69/74 [28] are appropriate, that case concerned a legal provision whose wording did not correspond to the provision in issue here: while the Article 11 provision subject to interpretation in that case refers to 'losses ... attributable to ... causes inherent in the nature of the goods', or in French only 'pertes ... dues ... à des causes dépendant de la nature des marchandises', an exemption is granted in this case only in respect of losses in the nature of '*Schwund*' or 'pertes *naturelles*'.

25 — The argument could be taken even further: in the final analysis every case of destruction of a product can be traced back to its inherent nature, for example destruction of a product by fire to its combustible nature, breakage of products to their fragility etc.

26 — Opinion of Advocate General Mancini of 6 July 1983 in *Esercizio Magazzini*.

27 — In point 3 of his Opinion Advocate General Mancini gives as an example of the loss attributable to the inherent nature of the product, spillage of fuel oil onto the road when the tank containing it bursts.

28 — Council Directive 69/74/EEC of 4 March 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to customs warehousing procedure (OJ 1969 L 58, p. 7).

V — Conclusion

57. In the light of the foregoing I propose that the Court answer the questions posed by the Cour de Cassation as follows:

(1) *Force majeure* as the cause of losses occurring under suspension arrangements in the sense of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products requires that the loss occurred because of events which are abnormal and unforeseeable, over which the party who relies on *force majeure* had no control and the consequences of which could not have been avoided even if all due care had been exercised.

(2) The loss of part of the products which leaked from an oil pipeline due to their liquid nature and to the characteristics of the ground on which they spilled, which prevented their recovery, cannot be regarded as a loss inherent in the nature of the products within the meaning of Article 14(1) of Directive 92/12.